Mega Air Conditioning Sdn Bhd v Speedfam Co Ltd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–208 OF 1998
MOKHTAR SIDIN, MOHD NOOR AHMAD AND ALAUDDIN JJCA
24 AUGUST 2001

Contract *— Breach — Refusal to accept delivery — Defendant charged for item already included in contract price, whether amounted to unilateral variation of contract — Whether defendant entitled to rescind contract — Extra charges negligible — Suspicion that defendant's unsuccessful bid motivated refusal to proceed with contract, whether relevant consideration*

The plaintiff agreed to manufacture and sell to the defendant an entire duct manufacturing system including the computer software support system. The total consideration was US$627,500. The contract price included the 100 foot fiber optic cable ('the foc'), an important component of the equipment and machinery. At first, the defendant wanted to use RS 232 cable but upon being advised by the plaintiff against its use, the defendant decided to use the foc. However, the plaintiff wanted to charge the defendant for it in the sum of US$280. The plaintiff claimed for the loss suffered as the result of the defendant's breach of contract in refusing to accept delivery of the goods ordered. The High Court found for the plaintiff. The defendant appealed.

Held, allowing the appeal:

(1) The plaintiff was not entitled to charge the defendant for the foc just because earlier the defendant changed its mind to use RS 232 cable since the foc was packaged in the contract price and the defendant finally agreed to use the foc on the plaintiff's advice. The plaintiff's conduct was tantamount to unilateral variation of the contract and therefore the plaintiff was in breach of the contract which entitled the defendant to rescind the contract (see p 326B, E–F).

(2) The judge erred because on the facts of the case the foc was the livewire of the whole system and the foc was included in the contract price, which on principle, the plaintiff could not charge the defendant for it. Therefore, the price of the foc which the plaintiff wanted to charge the defendant though small if compared to the total contract price could not be regarded as trifling and of negligible nature (see pp 326I–327A).

(3) The plaintiff undertook to supply the defendant the entire computer assisted duct manufacturing system which included the foc as part of the contract price. The judge was more concerned with logic rather than the true construction of the contract. In fact he did not construe the parties' contract at all. He failed to ask himself the basic question. By so failing he never gave effect to

their agreement. There were both non-direction and misdirection by the judge (see p 327B–D).

(4) The judge misdirected himself when he concluded that the defendant's unsuccessful bid for the KLCC project would land the defendant with the equipment that in all circumstances would become a white elephant and that reason motivated the defendant to refuse to proceed to honour its part of the bargain. His conclusion was a mere suspicion unsupported by evidence. Anyway, the defendant's motive was not relevant (see p 327D–E, H).

(5) Although the judge made certain conclusions based on his findings of fact it was manifestly clear that his conclusions on the main issue were plainly wrong. Hence, the court had to interfere. Therefore, the appeal was allowed with cost and the judgment of the judge set aside (see p 328E).

[Bahasa Malaysia summary

Plaintif telah bersetuju untuk membuat dan menjual kepada defendan semua sistem pembuatan salur termasuklah sistem sokongan perisian komputer. Balasan keseluruhan berharga US$627,500. Harga kontrak termasuklah 100 kaki kabel fiber optik ('kfo tersebut'), satu komponen penting peralatan dan mesin. Pada mulanya, defendan hendak menggunakan kabel RS 232 tetapi atas nasihat plaintif yang tidak menggalakkan penggunaannya, defendan membuat keputusan untuk menggunakan kfo tersebut. Namun begitu plaintif ingin mengenakan bayaran ke atas defendan untuknya bagi jumlah US$280. Plaintif menuntut kerugian yang dialami akibat daripada pelanggaran kontrak oleh defendan kerana enggan untuk menerima penghantaran barangan yang dipesan. Mahkamah Tinggi membuat keputusan yang menyebelahi plaintif. Defendan telah membuat rayuan.

Diputuskan, membenarkan rayuan tersebut:

(1) Plaintif tidak berhak untuk mengenakan bayaran ke atas defendan untuk kfo tersebut semata-mata kerana terdahulu daripada ini defendan telah menukarkan fikirannya untuk menggunakan kabel RS 232, memandangkan kfo tersebut telah termasuk dalam harga kontrak dan defendan akhirnya telah bersetuju untuk menggunakan kfo tersebut atas nasihat plaintif. Perbuatan plaintif tersebut sama seperti satu pengubahan (variation) unilateral kepada kontrak tersebut dan oleh itu plaintif telah melanggar kontrak tersebut yang memberikan hak kepada defendan untuk membatalkan kontrak tersebut (lihat ms 326B, E–F).

(2) Hakim telah khilaf kerana berdasarkan fakta-fakta kes, kfo tersebut adalah komponen terpenting keseluruhan sistem tersebut dan kfo tersebut telah disertakan dalam harga kontrak, di mana

atas prinsip, plaintif tidak boleh mengenakan bayaran ke atas defendan untuknya. Oleh itu, harga kfo tersebut yang plaintif ingin mengenakan bayaran ke atas defendan walaupun kecil jika dibandingkan dengan jumlah keseluruhan harga kontrak tidak boleh dianggap sebagai tidak penting dan bersifat kecil sahaja (lihat ms 326I–327A).

(3) Plaintif telah berjanji untuk membekalkan defendan keseluruhan sistem pembuatan salur bantuan komputer yang disertakan dengan kfo tersebut sebagai sebahagian daripada harga kontrak. Hakim lebih prihatin dengan logik daripada pentafsiran sebenar kontrak tersebut. Bahkan beliau tidak langsung menafsirkan kontrak pihak-pihak tersebut. Dengan kegagalan ini beliau tidak memberikan apa-apa kesan ke atas perjanjian mereka. Wujud kedua-dua tiada petunjuk dan salah arah oleh hakim tersebut (lihat ms 327B–D).

(4) Hakim telah sendiri salah arah apabila memutuskan bahawa tawaran defendan untuk projek KLCC yang telah gagal tersebut akan membebankan defendan dengan peralatan tersebut di mana dalam semua keadaan pun tidak akan membawa manfaat dan sebab tersebut telah merangsang defendan enggan meneruskan obligasinya di bawah perjanjian tersebut. Keputusan beliau hanya satu syak yang tidak disokong oleh keterangan. Namun begitu, motif defendan tidak relevan (lihat ms 327D–E, H).

(5) Walaupun hakim telah membuat kesimpulan-kesimpulan tertentu berdasarkan penemuan fakta beliau, ia amat jelas bahawa kesimpulan-kesimpulan beliau tentang persoalan utama tersebut memang salah. Justeru itu, mahkamah terpaksa campur tangan. Oleh itu, rayuan tersebut telah dibenarkan dengan kos dan penghakiman hakim tersebut diketepikan (lihat ms 328E).]

Notes

For cases on breach generally, see 3(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1946–2088.

Cases referred to

Clarke v Edinburgh Tramways (1919) SC (HL) 35 (refd)
Sivalingam v Periasamy [1995] 3 MLJ 395 (refd)

Appeal from: Suit No D5–22–1030 of 1994 (High Court, Kuala Lumpur)

Gopal Sreenevasan (*Belden Premaraj* and *SS Ng* with him) (*Sivananthan*) for the appellant.

Tommy Thomas (*Jimmy Chin* with him) (*Lee Boon Peng & Co*) for the respondent.

Mohd Noor Ahmad JCA (delivering judgment of the court):.

The plaintiff claimed for the loss suffered as the result of the defendant's breach of contract in refusing to accept delivery of the goods ordered. The High Court found for the plaintiff. The defendant appealed.

The primary facts in the present case are beyond dispute. Briefly, under two contracts, the plaintiff agreed to manufacture and sell to the defendant an entire duct manufacturing system including the computer software support system. The total consideration was US$627,500. The contract price included the 100 ft fiber optic cable ('the foc'). The foc was an important component of the equipment and machinery. Under the terms of payment, the defendant paid US$58,830.97 as deposit and as down payment with the order's confirmation of 27 April 1993 and 15 June 1992, and the balance by an irrevocable letter of credit to be settled by 15 August 1993 which the defendant failed to do. However, the plaintiff released to the defendant in September 1993 the said computer software, although the plaintiff was not contractually bound to do so. Under the contracts, the computer software support system, which formed an integral part of the equipment and machinery, and all the items ordered were to be delivered to the defendant only after full payment had been made. Then, on 25 January 1994, the defendant informed the plaintiff of its decision not to complete the purchase. Subsequently, the plaintiff sold some of the goods to third parties in order to mitigate the loss.

In the court below, the defendant raised four issues, viz:

(1) The goods ordered could not fit into the defendant's premises because the said goods were too large,

(2) the computer software was not fit for the purpose,

(3) the leakage factor, and

(4) the supply of the foc.

Before us, counsel for the defendant only raised issue (4) as the main thrust of his argument and two subsidiary issues: viz (i) issue (2); and (ii) the anticipatory breach on the part of the plaintiff.

We realize and fully appreciate that the learned judge made his decision based purely on his findings of fact. Therefore, it is our duty to scrutinize the decision with great care and caution. For it is only in rare cases that an appellate court should interfere with the primary findings of fact made by the trial court. Counsel for the plaintiff submitted that the judge did not err in his conclusions based on the findings of fact and therefore, urged upon us not to interfere with them. On this point, it would suffice that I refer to the well known passage in the speech of Lord Dunfermline in *Clarke v Edinburgh Tramways* (1919) SC (HL) 35 at p 36 which states:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgement is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgement that he believes one

> set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case, things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question: am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

However, there are qualifications to this. As an appellate court, it is our responsibility to intervene and set right the decisions of the trial court that are plainly wrong or unjust. The principles upon which an appellate court acts are clearly stated in *Sivalingam v Periasamy* [1995] 3 MLJ 395 at p 398 as follows:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

Before proceeding with the issues raised in this appeal, let me make it clear that the function of making primary findings of fact is confined exclusively to the trial court. We do not make findings of fact. We merely review the findings of primary fact made by the trial court.

Re: Issue (4) — the supply of the foc

On this issue, the judge stated and concluded:

> It is the defendant's contention that having included in this quantum a sum for the 100 ft fiber optic cable which formed part of the equipment and machinery ordered, the plaintiff had by its letter dated 11 January 1994 (1CABD 84) denied that the said 100 ft fiber optic cable was included. On this issue, the defendant argued that it had every right to ascertain the position of the 100 ft cable before paying the balance of the purchase price.
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> I think the answer to this lies in the plaintiffs reply via letter dated 11 January 1994. It is clear that the 100 ft fiber optic cable is a standard inclusion for the equipment purchased and the total price quoted therefore included the cost of this 100 ft cable. However, the defendant had instead requested for an RS 232 cable. On this account, the said letter clearly states 'We did not include any fiber optic system prices in your purchase price.' However, upon the plaintiff advising against the use of the RS 232 cable, the defendant changed its mind again into using fiber optics and therefore the cost of the 100 ft fiber optic cable has now to be included.

> In any case, it is totally improper for the defendant to refuse to honour the contract on this issue alone even if there is such a dispute, because from 1CABD 81, I note that the cost of this 100 ft fiber optic cable amounted to US$280 only. It baffles me as to why the defendant refused to complete a US$627,500 contract because of a US$280 disagreement. When confronted with this same poser, Ang replied:
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> > 'It is a matter of principle. This is only one of the factors why I didn't continue with the purchase order.'

A scrutiny of all the correspondences between the parties would reveal that, at first, the defendant wanted to use the RS 232 cable, but upon being advised by the plaintiff against its use, the defendant finally decided to use the foc. However, the plaintiff wanted to charge the defendant for it in the sum of US$280. This is the bone of contention by the defendant because the contract price included the foc. When the defendant failed to pay the balance of 90% by the letter of credit by 15 August 1993, by right, the plaintiff could have terminated the contracts and sued the defendant, which the plaintiff did not do. However, from its conduct, through correspondence, the plaintiff allowed time to be at large, and the plaintiff never made time the essence of the contract again. Therefore, the requirement that the defendant must settle the letter of credit by 15 August 1993 is no longer the issue.

The pertinent question is whether the plaintiff was entitled to charge the defendant for the foc just because earlier the defendant changed its mind to use the RS 232 cable? To my mind, the plaintiff was not entitled to do so because, firstly, the foc was packaged in the contract price and secondly, the defendant finally agreed to use the foc on the plaintiff's advice. The plaintiff's conduct was tantamount to unilateral variation of the contracts and therefore, the plaintiff was in breach of contract which entitled the defendant to rescind the contracts. The defendant was given the ultimatum by the plaintiff, by its letter of 11 January 1994 to communicate to the plaintiff by 12 January 1994 whether the defendant would want to use RS 232 cable at its own cost and risk or the foc which would be charged. Although there was no formal reply by the defendant to that ultimatum, the record shows that as on 14 January 1994, the defendant was still interested to proceed with the contracts, though they repudiated the contracts some two weeks later (re rekod rayuan jld 2 at p 310, last paragraph; Ang Eng Huat's (DW1) queries by notation in ink on the plaintiff's quotation (facsimile) of 10 January 1994 in rekod rayuan jld 2 at p 495) and rekod rayuan tambahan kedua at p 23, para 60). Of course, the defendant could have sent the letter of credit for the contract sum and insisted for the foc without charge. However, is it commercially wise? Would a prudent businessman do it? I do not think so, especially when the defendant was facing the space, computer and leakage problems and its bid for the KLCC project was unsuccessful.

The judge did not consider these points at all, instead he in effect applied the *de minimis* rule in favour of the plaintiff. Is the judge right? In my view, the judge had erred because on the facts of the case, the foc was the livewire of the whole system and the foc was included in the contract

price, which on principle, the plaintiff could not charge the defendant for. Therefore, the price of the foc which the plaintiff wanted to charge the defendant, though small if compared to the total contract price, cannot be regarded as trifling and of negligible nature. The general rule is that a party to a contract must perform exactly what he undertook to do (*Chitty on Contracts* (26th Ed) Vol 1 para 1991). It is not open to the courts to revise the words used by the parties, or to put upon them a meaning other than that which they ordinarily bear, in order to bring them with what the courts think the parties ought to have intended (para 827). In this case, on the face of the contracts, the plaintiff undertook to supply to the defendant the entire computer assisted duct manufacturing system which included the foc as part of the contract price. The judge was more concerned with logic rather than the true construction of the contracts. In fact, he did not construe the parties' contracts at all. He failed to ask himself the basic question. What did the parties agree? By so failing, he never gave effect to their agreements. Instead, he decided against the defendant by merely relying on the plaintiff's letter of 11 January 1994 which purported to explain why the foc had to be charged, which the defendant disputed until the end. To my mind, the explanation is devoid of any merit having regard to the basic terms of the contracts. Therefore, there is both non-direction and misdirection by the judge.

Further, the judge misdirected himself when he concluded that the defendant's unsuccessful bid for the KLCC project would land the defendant with the equipment, that in all circumstances becomes a white elephant, and that reason motivated the defendant to refuse to proceed to honour its part of the bargain. With due respect, his conclusion is a mere suspicion because it is unsupported by evidence. There is no evidence of the actual date or thereabout, when the defendant failed in the bid for the KLCC project, for the judge to consider the conduct and motive of the defendant subsequent thereto in order to arrive at that conclusion. On the contrary, the evidence overwhelmingly shows that, which I have said earlier, as late as 14 January 1994, the defendant was still interested in the contracts. In fact, at or about the relevant time, in order to meet its obligations with a third party on the delivery of ducts, the defendant purchased secondhand duct manufacturing equipment from Air Distribution Engineering Pte Ltd through its associated company, and after the repudiation of the contracts, the defendant had to purchase alternative duct manufacturing equipment from Engel Industries Inc through the same associated company. Anyway, the defendant's motive is not relevant.

Re: Subsidiary issue (i) — the computer software was not fit for the purpose

The judge was right in concluding that the deal was for a purchase of the entire system. The defendant cannot complain if a part of the entire system that was supplied was malfunctioning. The entire system must first be fitted and then if the system malfunctions the defendant can complain.

Re: Subsidiary issue (ii) — the anticipatory breach on the part of the plaintiff

The evidence reveals that the plaintiff sold two items under the contracts with the defendant to two Indonesian companies on 11 November 1993 and 3 November 1993 respectively, whilst at the same time the plaintiff was demanding the letter of credit from the defendant. This fact was not made known to the defendant earlier. Now the defendant is relying on anticipatory repudiation of the contract by the plaintiff as a defence. The defendant contends that by such sales, the plaintiff had indicated not to be bound in entirety by the contracts with the defendant. On the other hand, the plaintiff asserts that although the sales to the Indonesian companies were confirmed earlier, the plaintiff intended to ask the manufacturer to produce the goods for the purpose, whilst the goods for the defendant were stored by the manufacturer; however after the contracts were rescinded by the defendant, the plaintiff shipped the goods to the Indonesian companies. This kind of arrangement is common in business dealings. In short, at the time when the Indonesian contracts were confirmed, the goods under the contracts were not the same goods meant for the defendant. Therefore, the plaintiff was ready and willing to proceed with what had been contracted with the defendant. This contention had not been seriously challenged by the defendant. In my view, the plaintiff's version, having regard to the circumstances of the case, is plausible. Therefore, the defendant's reliance on this ground cannot hold water.

Although the judge made certain conclusions based on his findings of fact, it is manifestly clear that his conclusions on the main issue are plainly wrong. Hence, we have to interfere.

Therefore, the appeal is allowed with costs. The judgment of the judge is set aside. The plaintiff's claim is dismissed with costs. The defendant's counterclaim is allowed with costs as follows:

(i) US$58,830.90 less US$4,000 and US$8,000 for computer software supplied to, used and retained by the defendant, and

(ii) interest at the rate of 8%pa from the date of filing of the counterclaim until full settlement.

The deposit is to be refunded to the defendant.

My learned brothers Mokhtar Sidin and Alauddin JJCA have read this judgment in draft and have expressed their agreement with it.

Appeal allowed.

Reported by Jafisah Jaafar